



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

November 4, 1996

The Honorable Teel Bivins
Chair, Nominations Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Letter Opinion No. 96-121

Re: Whether base updated service credits
are calculated on the basis of the number of
months a member has performed credited
service and related questions (ID# 36101)

Dear Senator Bivins:

Government Code section 853.402(c)(1) requires the Texas Municipal Retirement System (the "retirement system") to calculate a member's base updated service credit using the number of months of credited service the member has accumulated. You ask whether, in calculating base updated service credits, the retirement system must include service for a partial year. Under section 853.402(c)(1), the calculation of base updated service credit is premised on the number of months, not years, of accumulated credited service. Consequently, we conclude that the retirement system must include service for a partial year.

You also ask, if we determine that the retirement system must include credited service for a partial year, what adjustments the retirement system must make in existing updated service credits and retirement annuities. In our opinion, to the extent the retirement system has incorrectly calculated updated service credits and retirement annuities because it incorrectly calculated base updated service credits, it must recalculate them. We do not consider, however, whether the retirement system has, in fact, erroneously calculated updated service credits and retirement annuities.

Government Code section 853.402 is a part of chapter 853, subchapter E. You state that, as you understand subchapter E, it provides a municipality an optional method by which to increase the value of retirement benefits for participating members of a defined contribution plan. Subchapter E, you suggest, provides a means by which the municipality may account for the effects of inflation over time.

Section 853.401(a) generally authorizes the governing body of a municipality that has chosen to participate in the retirement system¹ to adopt an ordinance authorizing the retirement system to recalculate members' credits for service to the municipality. Upon

¹See Gov't Code § 852.001 (providing for municipality's election to participate in retirement system).

notification of the municipal ordinance,² the retirement system must determine, for each affected member, the average updated service compensation, base updated service credit, and updated service credit.³ Each of these calculations incorporates as the reference date "the date prescribed by Subsection (e)," which is the "January 1 of the year immediately preceding the January 1 on which the updated service credits will take effect." In simple terms, a member's average updated service compensation is computed by averaging the member's average monthly compensation for the thirty-six months immediately preceding the date prescribed by subsection (e).⁴

Using the average updated service compensation, the retirement system calculates the member's base updated service credit:

The base updated service credit of a member is an amount computed as the number 1.03, times the difference by which the amount computed under Subdivision (1) exceeds the amount computed under Subdivision (2), where:

(1) "(1)" is an amount equal to the accumulation at three percent interest of [the average updated service compensation] for the *number of months* of credited service on the date prescribed by Subsection (e), . . . , times the sum of:

(A) the rate of contributions required of the member for current service; plus

(B) the member's contribution rate, times the municipal current service ratio in effect on the effective date of the ordinance adopted under Section 853.401; and where

(2) "(2)" is an amount equal to the sum of:

(A) the amount credited to the member's individual account in the employees saving fund on the date prescribed by Subsection (e), subject to a 1 to 1 matching ratio, times 2; plus

(B) the amount credited to the member's individual account, subject to a 1.5 to 1 matching ratio, times 2.5; plus

²See *id.* § 853.401(d).

³*Id.* § 853.402(a).

⁴*Id.* § 853.402(b), (e).

Then, using the base updated service credit, the retirement system may calculate the member's updated service credit:

The updated service credit of a member is an amount equal to the greatest of the following:

(1) the percentage [of base updated service credits the governing body has specified that the retirement system must use to compute updated service credits],⁶ times the member's base updated service credit; or

(2) any updated service credit previously authorized by the municipality and in effect for the member, accumulated at interest [on each whole calendar year beginning on the date the updated service credit takes effect and ending on the effective date of retirement]⁷ from the date it took effect to the date prescribed by Subsection (e); or

(3) prior service credit previously authorized by the municipality and in effect for the member, accumulated at interest [on each whole calendar year beginning on the date the updated service credit takes effect and ending on the effective date of retirement] from the date the credit took effect to the date prescribed by Subsection (e).⁸

The retirement system subsequently premises the calculation of the member's retirement annuity on the updated service credit.⁹

Under section 853.402(c)(1), a member's base updated service credit is explicitly premised upon the number of months of credited service the member has completed on the date prescribed by subsection (e). "Credited service" equals the number of months of prior and current service that are attributed to the member or that are included in a prior service certificate in effect for the member.¹⁰ Because the legislature has expressly referred to the number of months of a member's service, we must conclude that the legislature intended the retirement system to credit the member for service for a partial year.

⁶*See id.* § 853.401(c).

⁷*See id.* § 853.402(f).

⁸*Id.* § 853.402(d) (footnotes added).

⁹*See id.* § 854.002(a), (b).

¹⁰*See id.* § 851.001(14); *see also id.* §§ 853.001, .101, .201.

You suggest that whether, in calculating the base updated service credit, the retirement system must credit an employee for a partial year of service may depend upon whether Government Code section 855.306 applies to the calculation. We do not believe that it does.¹¹ Section 855.306 requires the retirement system to deposit money in a member's individual account. The amount of money to be deposited is the sum of four amounts:

- (1) the amount of contributions to the retirement system deducted from the member's compensation;
- (2) interest allowed on money in the account in accordance with this subtitle;
- (3) the portion of a deposit required by Section 853.003 to reinstate credited service previously canceled that represents the amount withdrawn; and
- (4) an amount deposited by the member in accordance with Section 853.502 to establish credited service for military service.¹²

The retirement system may not pay interest on money in a member's individual account for a part of a year.¹³

We do not see that the computation of the amount of money that must be deposited into a member's individual account under section 855.306, including the amount of interest to which the member is entitled, is relevant to the computation of base updated service credits (or even updated service credits). Nothing in the formulae described in section 853.402 for base updated service credit or updated service credit refer to or attempt to incorporate the sum described in section 855.306, nor do the formulae rely on the amount of interest due a member under section 855.306.

You also ask whether, if we determine that the retirement system must, in the calculation of a member's base updated service credit, include service for a partial year, the retirement system must adjust updated service credits and retirement annuities it has already calculated. Because we have so determined, we proceed to respond to your second question. Nevertheless, we note that you assume the retirement system's present calculations are incorrect. In fact, we have no evidence that they are. To the extent, of course, that the retirement system incorrectly has calculated members' base updated service cred-

¹¹Government Code section 855.306 may be implicated in determining whether the retirement system is to calculate interest for purposes of Government Code section 853.402(c)(1) on an annual, monthly, or some other basis.

¹²*Id.* § 855.306(a).

¹³*Id.* § 855.306(c).

its, updated service credits, and retirement annuities, the retirement system must recalculate the figures.

Although you ask no further questions, you have included with your request copies of correspondence between the retirement system and a claimant who apparently believes, among other things, that the retirement system incorrectly is calculating his base updated service credit. The disagreement appears to stem from the claimant's and the retirement system's differing interpretations of Government Code section 853.402(c)(1), which premises the base updated service credit in part on "an amount equal to the accumulation *at three percent interest of*" the employee's average updated service compensation for a certain period of time.¹⁴ Generally, this office does not presume to answer unasked questions. In this case, however, because the dispute is long-standing and because we believe we may resolve the issue, we will proceed to address the claimant's disagreement with the retirement system.

Notably, section 853.402(c)(1) does not specify whether interest should be calculated on a monthly, yearly, or some other basis. The claimant argues that the interest should be calculated as if it accumulated monthly. On the other hand, the retirement system believes that the interest should be calculated as if it accumulated annually. We agree with the retirement system.

Because section 853.402(c)(1) is ambiguous on its face as to whether interest should be calculated on a monthly or yearly basis, we examined the legislative history of the section. The legislature added the substance of what is now section 853.402 in 1975.¹⁵ We found nothing in the legislative history indicating whether the legislature intended interest to be calculated as accruing monthly or annually.

We understand, however, that the retirement system's board of trustees and director were required, immediately after the 1975 amendments became effective,¹⁶ to interpret the substance of section 853.402(c)(1) so that the retirement system could calculate the costs a particular municipality would incur if it elected to adopt the new provisions. At that time, the board construed the statute to require calculation of interest as if the interest accrued annually. A court will give weight to an agency's interpretation of an ambiguous statute.¹⁷ In this regard, we note that the retirement system's board of trustees is required by statute to adopt rules necessary to efficiently administer the system.¹⁸ We further note

¹⁴See *supra* p. 2 (quoting Gov't Code § 853.402(c)(1)).

¹⁵See Act of May 1, 1975, 64th Leg., R.S., ch. 171, § 15, 1975 Tex. Gen. Laws 382, 390-92.

¹⁶The amendments providing for updated service credits became effective September 1, 1975. See *id.* ch. 171, 1975 Tex. Gen. Laws 382, 393.

¹⁷Attorney General Opinion JM-1149 (1990) at 2.

¹⁸See Gov't Code § 855.102(a).

that the legislature has not, in over twenty years, seen fit to modify or reject the board's construction by amending the substance of section 853.402(c)(1).

Moreover, and most significantly, the retirement system's construction of section 853.402(c)(1) is wholly consistent with the statute. The purpose of the 1975 amendments was to permit a municipality to provide its employees and retired employees with a pension that accounted for inflation. For example, an employee who worked from 1955 to 1975 might retire in 1975 with a monthly annuity proportional to his or her average salary over twenty years, rather than proportional to the most recent salary received.¹⁹ Due to the rate of inflation, however, we understand that the employee in 1975 was earning substantially more than he or she had earned in 1955.²⁰ Upon retirement, the annuity was simply insufficient to replace, in any sense, the salary the employee had been earning at the time of retirement.²¹

Thus, the updated service credit provisions were designed to provide an annuity that would more closely "replace" the amount of money the employee had been making at the end of his or her career with the municipality. For example, the first part of the calculation under section 853.042(c)(1) is premised on the amount an employee would have contributed to the retirement system based on the employee's average compensation over the last thirty-six months earning interest at a specified rate. In our opinion, the legislature intended the interest to be calculated as accruing just as actual contributions to the retirement system accrue interest: annually.²² Additionally, in circumstances other than the calculation of updated service credits, the statute directs that interest is to be accumulated on an annual basis.²³ To compute interest on a monthly basis under section 853.402(c)(1) consequently would use an accrual rate that is more frequent than the statute otherwise allows.

¹⁹*See id.* § 854.007(d). The annuity is proportional just as the monthly premiums the employee and the municipality paid into the retirement system were proportional to the employee's salary. *See id.* §§ 855.401(a), .405.

²⁰*See* Hearings on H.B. 1195 Before the House Committee on Intergovernmental Affairs, 64th Leg., R.S. (Mar. 25, 1975) (testimony of Mr. Kendall, member of Texas Municipal Retirement System's board of trustees).

²¹*See id.* (testimony of Representative Blake, author of bill).

²²*See* Gov't Code § 855.306(b), (c).

²³*See* Gov't Code §§ 855.306(b), (c), 855.317(a)(4).

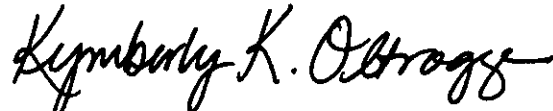
S U M M A R Y

Under Government Code section 853.402(c)(1), the Texas Municipal Retirement System must calculate a member's base updated service credit using the number of months of credited service the member has accumulated. Accordingly, the retirement system must credit the member for service for a partial year.

If, in fact, the retirement system incorrectly has calculated members' base updated service credits, it must recalculate them in accordance with section 853.402. The retirement system also must recalculate updated service credits and retirement annuities that are premised upon incorrect base updated service credits.

Finally, section 853.402(c)(1) requires that base updated service credit be calculated using, among other figures, "an amount equal to the accumulation at three percent interest" *per year* of an employee's average updated service compensation for a specified period of time.

Yours very truly,

A handwritten signature in black ink, reading "Kimberly K. Oltrogge". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee